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ALI JOHAR ABDUL JALIL v. PP

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: C-05-231-09-2013]
11 MAY 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Conduct of appellant – Whether appellant had knowledge of drugs – Whether*
C *there was affirmative finding of possession – Prosecution's failure to call material witnesses – Whether adverse inference under s. 114(g) Evidence Act 1950 invoked against prosecution – Whether trial judge exercised powers under s. 425 Criminal Procedure Code – Whether witnesses offered to defence – Whether appellant's defence considered and judicially appreciated by trial judge – Whether appellant prejudiced*
D *by trial court's decision*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Conduct of appellant – Whether appellant had knowledge of drugs – Whether there was affirmative finding of possession –*
E *Prosecution's failure to call material witnesses – Whether adverse inference under s. 114(g) Evidence Act 1950 invoked against prosecution – Whether trial judge exercised powers under s. 425 Criminal Procedure Code – Whether witnesses offered to defence – Whether appellant's defence considered and judicially appreciated by trial judge – Whether appellant prejudiced by trial court's decision – Dangerous Drugs Act 1952, s. 39B(1)(a) – Whether appellant denied of fair trial*

F

CRIMINAL PROCEDURE: *Trial – Miscarriage of justice – Prosecution's failure to call material witnesses – Whether appellant prejudiced – Whether appellant's defence considered and judicially appreciated by trial judge*

CRIMINAL PROCEDURE: *Witness – Material witness – Prosecution's failure to*
G *call witnesses – Whether appellant prejudiced – Whether witnesses offered to defence – Whether trial judge exercised powers under s. 425 Criminal Procedure Code – Whether adverse inference under s. 114(g) Evidence Act 1950 invoked*

EVIDENCE: *Judge – Power to call witness – Prosecution's failure to call material witnesses – Whether appellant prejudiced – Whether trial judge exercised powers*
H *under s. 425 Criminal Procedure Code – Whether witnesses offered to defence – Whether appellant denied of fair trial*

EVIDENCE: *Witness – Failure to call witnesses – Whether appellant prejudiced by prosecution's failure to call witnesses – Whether witnesses offered to defence – Whether trial judge exercised powers under s. 425 Criminal Procedure Code –*
I *Whether adverse inference under s. 114(g) Evidence Act 1950 invoked*

The appellant was charged for trafficking in 24.34g of dangerous drugs, *ie*, 11.59g of heroin and 12.75g of monoacetylmorphine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. It was the prosecution's case that the raiding officer, SP2, received information, *inter alia*, that a drug trafficking transaction would be carried out by a man of Myanmar nationality named 'Ali' using a Proton Wira car. When the suspected vehicle arrived, SP2 noticed that that the driver ('Subramaniam'), had alighted from the car whilst carrying a sling bag and walked up to the front passenger's door. It was observed that the appellant and one Rashidah were seated in the car. SP2 noticed that the appellant came out from the front passenger seat carrying a black sling bag and at the same time, Rashidah alighted from the back seat of the said car. The appellant, Subramaniam and Rashidah were seen converging together and having a conversation. SP2 and his men rushed towards them and conducted a search on the appellant and Subramaniam, but nothing incriminating were found on them. However, upon investigation, it was found that the sling bag carried by the appellant contained the dangerous drugs. According to SP2, the appellant, Subramaniam and Rashidah were shocked and struggled to free themselves. During defence, the appellant denied being in possession of the drugs and submitted his version of the defence in relation to the incident that happened on that day. The High Court Judge found that the appellant had put up a fierce struggle with the policemen attempting to arrest him and this conduct inferred that the appellant had knowledge of the drugs. Further, the trial judge ruled that the appellant failed to adduce any evidence to rebut the presumption of trafficking. As such, the appellant was found guilty and sentenced to death. Hence, this appeal. The issues canvassed before this court were: (i) the prosecution failed to prove knowledge since the finding of 'fierce struggle' was misplaced; (ii) the application of s. 114(g) of the Evidence Act 1950 ('s. 114(g)') in this case since both Subramaniam and Rashidah, who were material witnesses, were not called as witnesses or offered to the defence, causing prejudice to the appellant; and (iii) there was a miscarriage of justice since the appellant's defence was not considered and judicially appreciated by the trial judge.

Held (allowing appeal; setting aside decision of the High Court)
Per Zamani A Rahim JCA delivering the judgment of the court):

(1) The information received by SP2 in relation to the fact, *inter alia*, that a drug trafficking transaction would be carried out by a man of Myanmar nationality named Ali was hearsay, irrelevant and highly prejudicial evidence against the appellant. It was therefore inadmissible (*Alcontara Ambross Anthony v. PP*; refd). (para 22)

(2) The trial judge failed to make any affirmative finding of possession at the close of the prosecution's case. On this issue, the finding of a 'fierce struggle' was not a misdirection. There was evidence that the appellant

A was shocked and struggled which was perhaps a mere misdescription of the appellant's conduct showing his knowledge of the drugs. Such a mere misdescription was not fatal to the prosecution's case. (para 25)

(3) Both Subramaniam and Rashidah were arrested together with the appellant and they were together with the appellant all along. It was B reasonable to infer that the s. 112 statements were recorded from Subramaniam and Rashidah. However, their statements were not tendered or handed over to the appellant. The trial judge failed to direct his attention to the issue of Subramaniam and the consequence of the failure to call him to testify or to offer him for cross-examination or to C produce his s. 112 statement. Similarly, Rashidah was not called or offered and her s. 112 statement was not given to the defence. The prosecution's effort to trace her was negligible. No advertisements were made in the local dailies or newspapers to call for her attendance in court. The appellant was deprived of the opportunity to elicit matters D favourable to the defence. (paras 26, 27, 29 & 33)

(4) The trial judge could have exercised his powers under s. 425 of the Criminal Procedure Code for Rashidah to be produced to verify the truth of the appellant's version and not to indulge in conjecture that Rashidah would not be available even if the case was postponed. The E trial judge did not appear to appreciate the importance of Rashidah to the defence. As a result, the appellant was denied of a fair trial (*Lee Kwan Woh v. PP*; refd). (para 30)

(5) The trial judge failed to address his mind on the importance of Subramaniam and Rashidah having regard to the appellant's defence. F Such failure caused prejudice to the appellant and had occasioned a miscarriage of justice. An adverse inference under s. 114(g) arose against the prosecution in that if produced, their evidence would not be favourable to the prosecution. The trial judge had also failed to appreciate the defence which was consistent throughout (*Jamaludin Md* G *Kasim v. PP*; refd). (paras 33 & 36)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh mengedar 24.34g dadah berbahaya, iaitu, 11.59g heroin dan 12.75g monoacetylmorphine, satu kesalahan di bawah s. 39B(1)(a) Akta H Dadah Berbahaya 1952. Adalah kes pihak pendakwaan bahawa pegawai serbuan, SP2, telah menerima maklumat, antara lain, bahawa satu transaksi pengedaran dadah akan dijalankan oleh seorang lelaki warganegara Myanmar bernama Ali dengan menggunakan sebuah kereta Proton Wira. Apabila kenderaan yang disyaki itu tiba, SP2 melihat bahawa pemandunya I ('Subramaniam') telah turun dari kereta itu sambil membawa satu beg sandang dan menuju ke pintu penumpang hadapan. Perayu dan seorang

bernama Rashidah turut berada di dalam kereta tersebut. SP2 melihat bahawa perayu telah keluar dari tempat duduk penumpang di hadapan membawa sebuah beg sandang berwarna hitam dan pada masa yang sama, Rashidah telah keluar dari tempat duduk penumpang belakang kereta tersebut. Perayu, Subramaniam dan Rashidah dilihat berbual antara satu sama lain. SP2 dan pasukannya telah menghampiri mereka dan satu pemeriksaan badan dilakukan ke atas perayu dan Subramaniam tetapi tiada apa-apa yang disyaki dijumpai. Walau bagaimanapun, selepas siasatan, didapati bahawa beg sandang yang dibawa oleh perayu mengandungi dadah berbahaya. Menurut SP2, perayu, Subramaniam dan Rashidah berada dalam keadaan terkejut dan meronta-ronta untuk membebaskan diri. Semasa pembelaan, perayu menafikan bahawa dia memiliki dadah tersebut dan telah mengemukakan versi pembelaannya berkenaan kejadian yang berlaku pada hari itu. Hakim Mahkamah Tinggi mendapati bahawa perayu telah melakukan pergelutan sengit dengan pihak polis semasa penangkapannya dan kelakuan ini menunjukkan bahawa perayu mempunyai pengetahuan mengenai dadah tersebut. Tambahan, hakim bicara memutuskan bahawa perayu telah gagal mengemukakan sebarang keterangan untuk mematahkan anggapan pengedaran. Perayu didapati bersalah dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Isu-isu yang dikemukakan di mahkamah ini adalah: (i) pihak pendakwaan gagal untuk membuktikan pengetahuan memandangkan penemuan 'fierce struggle' adalah suatu yang tidak kena pada tempatnya; (ii) pemakaian s. 114(g) Akta Keterangan 1950 ('s. 114(g)') dalam kes ini memandangkan Subramanian dan Rashidah, yang merupakan saksi-saksi penting, tidak dipanggil sebagai saksi atau ditawarkan kepada pihak pembelaan dan in telah menyebabkan prejudis kepada perayu; dan (iii) terdapat ketidakadilan memandangkan pembelaan perayu tidak dipertimbangkan dan dinilai secara kehakiman oleh hakim bicara.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)

Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:

(1) Maklumat yang diterima oleh SP2 berkenaan fakta, antara lain, bahawa satu transaksi pengedaran dadah akan dijalankan oleh seorang lelaki warganegara Myanmar bernama Ali merupakan dengar cakap, tidak berkaitan dan keterangan yang bersifat prejudis terhadap perayu. Oleh itu, ia tidak diterima masuk (*Alcontara Ambross Anthony v. PP*; dirujuk).

(2) Hakim bicara gagal membuat sebarang penemuan afirmatif pemilikan pada penutupan kes pihak pendakwaan. Berkaitan dengan isu ini, penemuan suatu pergelutan sengit bukanlah salah arahan. Terdapat keterangan bahawa perayu terkejut dan meronta-ronta yang merupakan suatu salah keperihalan kelakuan perayu yang menunjukkan pengetahuannya terhadap dadah tersebut. Salah keperihalan sebegitu tidak menjejaskan kes pihak pendakwaan.

(3) Kedua-dua Subramaniam dan Rashidah telah ditangkap bersama-sama dengan perayu dan mereka sentiasa berada bersama perayu. Adalah munasabah untuk menganggap bahawa kenyataan s. 112 telah direkodkan daripada Subramanian dan Rashidah. Walau bagaimanapun, kenyataan mereka tidak dikemukakan ataupun diberikan kepada perayu. Hakim bicara gagal untuk mengarahkan perhatiannya terhadap isu Subramaniam dan kesan kegagalan untuk memanggilnya untuk memberi keterangan atau menawarkannya untuk pemeriksaan balas ataupun mengemukakan kenyataan s. 112 olehnya. Begitu juga, Rashidah tidak dipanggil atau ditawarkan dan kenyataan s. 112 olehnya tidak diberikan kepada pihak pembelaan. Usaha pihak pendakwaan untuk mengesannya telah diabaikan. Tiada iklan dibuat dalam surat khabar untuk memastikan kehadirannya di mahkamah. Perayu telah dilucutkan peluang untuk membentangkan perkara-perkara yang berpihak kepada pembelaan.

(4) Hakim bicara sepatutnya melaksanakan kuasanya di bawah s. 425 Kanun Tatacara Jenayah supaya Rashidah dikemukakan untuk mengesahkan kebenaran versi perayu tanpa membuat kesimpulan bahawa Rashidah tidak boleh dikemukakan walaupun kes ditunda. Hakim bicara tidak menghargai betapa pentingnya Rashidah kepada pihak pembelaan. Perayu, oleh itu, dinafikan suatu perbicaraan adil (*Lee Kwan Woh v. PP*; dirujuk).

(5) Hakim bicara gagal mempertimbangkan betapa pentingnya Subramaniam dan Rashidah dengan mengambilkira pembelaan perayu. Kegagalan sebegitu telah menyebabkan prejudis kepada perayu yang menyebabkan ketidakadilan. Suatu anggapan bertentangan di bawah s. 114(g) dibangkitkan terhadap pihak pendakwaan di mana jika dikemukakan, keterangan mereka tidak akan berpihak kepada pihak pendakwaan. Hakim bicara juga gagal untuk menghargai pembelaan yang konsisten pada setiap masa (*Jamaludin Md Kasim v. PP*; dirujuk).

Case(s) referred to:
Aedy Osman v. PP [2011] 1 CLJ 273 FC ***(dist)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Ambiya Mohamad & Ors v. PP [2014] 4 CLJ 653 CA ***(refd)***
Azmer Mustafa v. PP [2014] 8 CLJ 413 CA ***(refd)***
Jamaludin Md Kasim v. PP [2010] 9 CLJ 377 FC ***(refd)***
Kobra Taba Seidali v. PP [2014] 2 CLJ 12 CA ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Mohd Nazri Omar & Ors v. PP [2014] 1 LNS 576 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 425
Dangerous Drugs Act 1952, ss. 39A(1), 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)

For the appellant - Rosal Azimin Ahmad (Muhammad Amiraizat Abdul Rani with him); M/s Shamsuddin & Co
For the respondent - Tengku Intan Suraya Tengku Ismail; DPP

[Appeal from High Court, Temerloh; Criminal Trial No: 45A-71-2011]

Reported by Kumitha Abd Majid

JUDGMENT

Zamani A Rahim JCA:

Introduction

[1] The appellant was charged and tried before the High Court at Temerloh for trafficking in 24.34g (11.59g heroin and 12.75g monoacetylmorphine), an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the Act. The charge reads as follows:

> Bahawa kamu Ali Johar bin Abdul Jalil, pada 11hb Disember 2011, lebih kurang jam 3.15 petang di tempat letak kereta berhadapan bangunan Surau Plaza Tol Temerloh, di dalam Daerah Temerloh di dalam Negeri Pahang, didapati mengedar dadah berbahaya, berat bersih 24.34 gram (11.59 gram Heroin dan 12.75 gram Monoacetylmorphines) dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] At the end of the trial, the appellant was convicted and sentenced to death by the High Court Judge. Hence, this appeal.

The Prosecution's Case

[3] Sub-Inspector Mohd Zaki bin Abdul Rahman, (SP2) received information through a phone call informing him that, on 1 December 2011 a drug trafficking transaction would be carried out by a man of Myammar nationality named 'Ali', using a Proton Wira car, bearing registration number BFJ 8627 at the Temerloh Toll Plaza at any time between 12 noon till midnight.

[4] Acting on the tip off, SP2 informed his senior officer, ASP Azli who directed him to mount an operation at the Temerloh Toll Plaza. SP2 gathered 14 police personnel and briefed them on the operation. SP2 divided them into groups with their respective duties.

[5] At about 3.05pm on the same day, Sgt Zulkifli alerted SP2 about the arrival of the suspected vehicle, a Proton Wira, bearing registration No. BFJ 8627.

[6] SP2 noticed the driver of the said motorcar, an Indian man (Subramaniam) alighted from the motorcar, carrying a sling bag and walked up to the front passenger door. SP2 noticed a man (subsequently identified

as "the appellant") came out from the front passenger seat carrying a black sling bag, (P13), and at same time a lady (Rashidah) alighted from the backseat of the said motorcar. The appellant, Subramaniam and Rashidah were seen converging together and having a conversation.

[7] SP2 and his men rushed towards the appellant, Subramaniam and Rashidah. Upon identifying himself as a police officer and the police apprehended them. They put up a struggle. Having overpowered the appellant and Subramaniam, their bodies were searched but nothing incriminating were found on them.

[8] SP2 examined the sling bag, P13 carried by the appellant, he recovered a green plastic bag printed with the words "Seven Eleven", (P11). Inside P11, SP2 found a plastic packet containing powderish and granular greenish substance, (P12) which SP2 suspected to be drugs. Apart from the suspected drugs, an Ampang Hospital appointment card and a bail bond document issued by Kemaman Magistrates' Court, both documents were in the name of the appellant, and two hand phones were also recovered from the bag, P13. SP2 handed all the exhibits seized, including the suspected drugs and the appellant to the Investigating Officer, Insp. Sharifah Hazrena binti Syed Mohd Zolkifli, (SP3).

[9] The suspected drugs was sent to the Chemistry Department and upon analysis by the government chemist, Suriani binti Mat Yassin, (SP5), the substance was confirmed to be dangerous drugs namely, heroine and monoacetylmorphine, weighing a total net weight of 24.35g.

The Defence Case

[10] The appellant gave evidence on oath. He was married to Rashidah. He ran a restaurant in Ampang, Kuala Lumpur. He wanted to visit his sick mother-in-law in Kemaman.

[11] As the appellant had no driving licence, he enlisted Subramaniam to drive the car. He borrowed the Proton Wira car, BFJ 8627 from his relative. Subramaniam was his regular customer whom he had known for about a year.

[12] On the day in question, Subramaniam drove the car. The appellant was seated in the front passenger seat. His wife Rashidah was seated at the backseat. He did not carry any bag as he intended to return to Kuala Lumpur the same day. Subramanian carried two bags - a sling bag and a laptop bag.

[13] Upon arrival at Temerloh Toll, Subramaniam stopped the car as he intended to meet his friend. The appellant and his wife, Rashidah went to the toilet. As the appellant came out from the toilet, he was approached by a man who was supposedly Subramaniam's friend. His name was Kamal Ayam.

[14] At the invitation of Kamal Ayam, he entered a black Waja car and sat at the backseat of the car, behind the driver's seat. Kamal Ayam was on the driver's seat. An unidentified male Malay was seated in the front seat next to Kamal Ayam.

[15] About five minutes later, Rashidah came. She carried a package wrapped in newspapers and plastic. She gave the package to Kamal Ayam. While in the black Waja car with Kamal Ayam, the appellant noticed a Camry car made a few rounds near the Waja car.

[16] The Camry car stopped. About three to four men (who the appellant later came to know to be police officers) approached the appellant and Rashidah. Both of them were arrested and handcuffed. They were then taken to a Pajero and subsequently to the appellant's Proton Wira car. The appellant noticed that Subramaniam was also handcuffed.

[17] The police examined Subramaniam's sling bag and took out a package. The package was shown to Subramaniam. The police also examined the inside of the car and recovered a photostat copy of the car's registration card, a hospital appointment card and the bail bond document from the sun visor in the car. The appellant's personal documents were put into another bag which was held by the police.

[18] At the suggestions of the learned Deputy Public Prosecutor in cross-examination, the appellant replied as follows:

(a) He denied that Ah Meng called him a day earlier to meet at Temerloh Toll Plaza;

(b) He denied that he informed Subramaniam that he went to Temerloh to deliver the drugs to Ah Meng;

(c) He denied that he informed his wife, Rashidah that he wanted to meet Ah Meng;

(d) He denied that the sling bag, P13 was not slung on his shoulder from left to right;

(e) He denied that the bail bond document, the Ampang Hospital appointment card and the Proton Wira's registration card were found in the sling bag, P13; and

(f) That the black Waja car and Kamal Ayam were in existence.

Decision Of The High Court

[19] At the end of the trial, the trial judge decided that the prosecution had proven the trafficking charge against the appellant beyond reasonable doubt and found the appellant guilty as charged and sentenced him to death, based on the following grounds.

A (i) The appellant's consistency does not in any way suggest that his version must be the truth. The appellant could have concocted his defence from the beginning so that he would not be accused of giving an afterthought defence;

B (ii) There was no doubt that the drugs were found in the bag carried by the appellant. The court could not believe the appellant's version that his personal documents were recovered from the car and not from the bag. It makes no sense for the appellant to keep his personal documents in the car when the car is a borrowed car;

C (iii) The appellant failed to raise even a semblance of doubt especially since the court believed wholly the version of the police as to what transpired on the day in question leading to the arrest of the appellant; and

(iv) The appellant in his concerted effort to deny possession, failed to adduce any evidence to rebut the presumption of trafficking which he is bound D to do, on a balance of probabilities.

The Appeal

[20] There were three issues canvassed before us:

(a) There was no affirmative finding of possession by the trial judge. The E prosecution has failed to prove knowledge as the finding of 'fierce struggle' was misplaced as no such struggle took place;

(b) Subramaniam and Rashidah were material witnesses. They were arrested but not called as witnesses or offered to the defence and this has caused prejudice to the appellant. This is an appropriate case for the F application of s. 114(g) of the Evidence Act 1950; and

(c) The defence of the appellant was not considered and judicially appreciated by the trial judge and such failure has occasioned a miscarriage of justice.

G **Our Decision**

[21] Having heard the appeal, we found that there were merits in the grounds raised by the appellant. We therefore unanimously allowed the appeal and we set aside the conviction and sentence of the High Court. The appellant was acquitted and discharged. We now give our reasons.

H

[22] At the outset, we wish to state that the information - a drug trafficking transaction would be carried out by a man of Myammar nationality named Ali, using a Proton Wira car, bearing registration number, BFJ 8627 at Temerloh Toll Plaza - received by SP2 is hearsay, irrelevant and highly prejudicial evidence against the appellant. It is therefore inadmissible: see I *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705.

[23] On the first issue relating to knowledge which is a constituent element of possession, the trial judge wrote at p. 224 of appeal record vol. 1 as follows:

> In this case however there are other facts which show that the accused had knowledge of the drugs in the bag he was carrying. This can be seen from the fact that accused put up a fierce struggle with the policemen attempting to arrest him. The conduct of the accused is a relevant fact from which to infer that he had knowledge of the drugs. An innocent person would not attempt to put up such a struggle but instead plead his innocence.

[24] Learned counsel argued that the trial judge's finding of 'a fierce struggle' as indicating knowledge of the drugs by the appellant was a misdirection. Learned counsel submitted that the said fierce struggle never occurred. According to the raiding officer, SP2, the appellant, Subramaniam and Rashidah were merely 'terkejut' and 'meronta-ronta' to free themselves which was a normal reaction by civilians who were caught suddenly by plain clothes policemen.

[25] The trial judge has also failed to make any affirmative finding of possession at the close of the prosecution case. On this issue, we found that the finding of "a fierce struggle" is not a misdirection by the trial judge. There was evidence that the appellant was shocked and struggled (terkejut dan meronta-ronta) which is perhaps a mere misdescription of the appellant's conduct showing his knowledge of the drugs. Such a mere misdescription is not fatal to the prosecution's case. We found the submission of learned counsel on the issue of possession and knowledge is without merit.

[26] The appellant is on a firmer ground on the second issue, that is, the non-production or non-offering of Subramaniam and Rashidah, who are material witnesses, has prejudiced the appellant. Both Subramaniam and Rashidah were arrested together with the appellant at the car. They were together with the appellant all along. They were present at the time of the search, witnessed the recovery of the exhibits and all of them executed the search list, P4. Their finger impressions and blood specimen were taken for DNA profiling purposes but proved negative. The evidence showed that Subramaniam was charged at the Temerloh Magistrates' Court for an offence under s. 39A(1) of the Act which is a bailable offence. Was he on court bail or under remand pending hearing? If on bail, was the assistance of the bailor sought to trace him? The case against Subramaniam was discharged not amounting to an acquittal (DNAA). As for Rashidah, SP3 said that she was to be released on police bond on the instruction of the learned Deputy Public Prosecutor, but there is no evidence whether she was so released. According to SP3, warrants of arrest were applied against both of them and to date the warrants were not executed.

[27] On the factual matrix of this case, it is reasonable to infer that s. 112 of the Criminal Procedure Code statements were recorded from Subramaniam and Rashidah. But their statements were not tendered or handed over to the appellant. In the case of *Kobra Taba Seidali v. PP* [2014] 2 CLJ 12, the Court of Appeal said:

> Having said that, if the witness cannot be produced by the prosecution it will be appropriate for the prosecution to hand over the s. 112 statement recorded from the witness to whittle down any complaint by the defence to invoke s. 114(g) of EA 1950 as in the instant case.
>
> In the instant case, we take the view the failure of the prosecution to produce Maryam as a witness or hand over a copy of the witness statement to the defence to be used if it is favourable as part of the defence exhibit at the defence stage is fatal on the factual matrix of the case. In addition the failure of the prosecution to rebut the '*Alcontara* Notice' or give appropriate reason to do so is also fatal. [See *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; *Munuswamy Sundar Raj v. PP* [2013] 1 LNS 183; [2013] 5 MLJ 48]. In consequence we agree with learned counsel that an opportunity of fair trial has been compromised by the prosecution.

[28] In the case of *Mohd Nazri Omar & Ors v. PP* [2014] 1 LNS 576, the Court of Appeal said:

> 18. The appellants submitted that section 114(g) of the Evidence Act 1950 ("Evidence Act") should be invoked against the prosecution for failing to produce Long Chai as a witness, failing to offer him for cross-examination and failing to produce Long Chai's s. 112 statement as:
>
> > 18.1. it was insufficient for the prosecution to adduce evidence through SP10, the investigating officer, that she had recorded a statement from Long Chai, that attempts were made to locate him to no avail;
> >
> > 18.2. no reason was given as to why the s. 112 statement, which was in the possession of the prosecution, could not be produced;
> >
> > 18.3 the appellants were disadvantaged by the non-production of Long Chai or his s. 112 statement as it had made them unable to challenge the evidence of SP6 effectively.

See also *Ambiya Mohamad & Ors v. PP* [2014] 4 CLJ 653, and *Azmer Mustafa v. PP* [2014] 8 CLJ 413.

[29] The trial judge had failed to direct his attention to the issue of Subramaniam and the consequence of the failure to call him to testify or to offer him for cross-examination or to produce his s. 112 statement. As for Rashidah, similarly she was also not called or offered. Neither was her s. 112 statement given to the defence. The prosecution's effort to trace her is negligible. An attempt was made to trace her at her home address but failed. That was about all. No advertisements were made in the local dailies or

newspapers to call for her attendance in court. On this issue, learned trial judge held the view that the prosecution was not bound to produce Rashidah as the former did not offer her to the defence. The trial judge wrote at pp. 143 and 144 of the notes of evidence, vol. 1 as follows:

> Mahkamah
> Tidak ditawarkan you are not bound to produce … dan kalau tidak, usaha dah dibuat tak boleh, … no point postponing just to get her, because the result will be the same. So selain daripada that saksi, tak ada saksi lain.
>
> Peguambela OKT - En. Rozilan
> Tidak ada saksi.
>
> Mahkamah
> Teruskan kes.

[30] We were of the view that the trial judge could have exercised his powers under s. 425 of the Criminal Procedure Code for Rashidah to be produced to verify the truth of the appellant's version and not to indulge in conjecture that Rashidah's would not be available even if the case was postponed. On the facts and circumstances of this case, the trial judge did not appear to appreciate the importance of Rashidah to the defence. The trial judge was eager for the prosecution to close its case without having regard to fairness and justice for the appellant. The appellant was obviously denied of a fair trial: see *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 FC.

[31] With regard to Subramaniam, had he been called as a witness, he could have shed light on pertinent matters as follows:

(a) Whether he was the driver of a Proton Wira, BFJ 8627;

(b) Whether he carried a black sling bag and a black laptop bag;

(c) He stopped the Proton Wira at Temerloh Toll Plaza at his instance to meet his friend, Kamal Ayam. Was Kamal Ayam present at the said Toll Plaza?;

(d) When he was arrested and a package retrieved from his black sling bag, was the package shown to him? What was the content of the package?;

(e) Whether the black Waja was present near the toilet;

(f) Whether the sling bag, P13 was slung across the appellant's body;

(g) Whether the appellant informed him that he wanted to deliver the drugs to Ah Meng. (see p. 206 of appeal record);

(h) The existence of a Camry car and a Pajero; and

(i) Whether the personal documents of the appellant were recovered from the bag, P13 or from the sun visor inside the car.

[32] In the case of Rashidah, several crucial matters may be elicited and verified by her as follows:

(a) Who made the decision to stop the Proton Wira at the Temerloh Toll Plaza?;

(b) Whether the appellant and Subramaniam carried any bags. Did the appellant carry the sling bag, P13 on his shoulder?;

(c) Did she and the appellant go to the toilet and did she notice the black Waja car near the toilet?;

(d) Did she meet Kamal Ayam in the black Waja car and handed over a package wrapped in newspapers and a plastic to Kamal Ayam? Where did she get the package from and did she know its contents? Where was the appellant at that time?;

(e) Was the sling bag, P13 the appellant's bag?;

(f) Was she informed by the appellant that the latter had intended to meet Ah Meng?; and

(g) Were the personal documents of the appellant, namely, the bail bond document and hospital appointment card taken from the bag, P13 or from the sun visor inside the car?

[33] We are of the view that the failure to call Subramaniam and Rashidah, who are material witnesses or to offer them to the defence at the close of the prosecution's case, or to give their s. 112 statements to the defence, had deprived the appellant of the opportunity to elicit the matters favourable to the defence. The trial judge also failed to address his mind on the importance of Subramaniam and Rashidah having regard to the appellant's defence. Such failure has caused prejudice to the appellant and has occasioned a miscarriage of justice. An adverse inference under s. 114(g) has arisen against the prosecution in that if produced their evidence would not be favourable to the prosecution: see *Mohd Nazri Omar*, *supra*. In *Jamaludin Md Kasim v. PP* [2010] 9 CLJ 377, the Federal Court at p. 388 para. 24 said *inter alia*:

> Another point is this. In *Ti Chuee Chiang v. Public Prosecutor*, learned counsel for Ti Chuee Hiang in the course of his submission before the High Court criticised the prosecution for failing to call the informer, but nowhere in his judgment did the trial judge direct his attention to this point. This was ruled by the Federal Court to be a serious misdirection by way of non direction which had occasioned a grave miscarriage of justice.

[34] Learned Deputy Public Prosecutor relied on the Federal Court case of *Aedy Osman v. PP* [2011] 1 CLJ 273 and argued that Subramaniam and Rashidah were not established to have any link or connection with the drugs and therefore s. 114(g) is inapplicable. It is noteworthy that the facts and circumstances in *Aedy Osman*'s case, *supra* are distinguishable from the facts in the present case.

[35] The third issue raised is the trial judge's failure to judicially consider the appellant's defence. The trial judge found that the appellant had concocted his defence. At p. 228, para. 6 of appeal record vol. 1 as follows:

> It could be very well be the accused had concocted his defence from the beginning so that he would not be accused of giving an afterthought defence.

[36] We find that the trial judge has failed to appreciate the defence which was consistent throughout. Having considered the evidence, we decided the second and the third issues in favour of the appellant.

Conclusion

[37] For reasons stated above, it is our considered view that the appellant's conviction is unsafe. Consequently we allowed the appeal. The conviction and sentence of death by the High Court Temerloh was set aside. The appellant was acquitted and discharged.